IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JAIPUR BENCH, JAIPUR.

:: J U D G M E N T ::

D.B. CIVIL SPECIAL APPEAL (WRIT) NO.548/2006

Chandra Prakash
Vs.
The Additional District Judge (Fast Track), Jhalawar & Anr.

Date of Judgment :: 1st September, 2006

P R E S E N T

HON'BLE THE CHIEF JUSTICE SHRI S.N. JHA
HON'BLE SHRI JUSTICE AJAY RASTOGI
: :

Shri K.K. Mehrishi and
Shri Sanjay Mehrishi for the appellant.
Shri Devendra Radhava, for respondent no.2.

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BY THE COURT (PER HON'BLE THE CHIEF JUSTICE)

This special appeal is directed against the order of the learned Single Judge dated 3.5.2006 in

S.B. Civil Writ Petition no.2485/2006 dismissing the writ petition of the appellant. The appellant had filed the writ petition challenging order of the Additional District Judge (Fast Track), Jhalawar dated 18.3.2006 rejecting his prayer for amendment of the written statement.

The proposed amendment was in two parts. While seeking to add averments in paragraphs 2, 4, 5 and 10 of the written statement, the appellant also sought to set up counter claim.

For appreciating the case of the parties on the point of the amendment their respective case as pleaded in the plaint and the written statement may briefly be stated.

Respondent no.2 filed suit for specific performance of contract against the appellant stating that on his representation that he was owner and in possession of the land measuring 39 bighas and 18 biswas at village Khandiya, Tehsil Jhalara Patan, District Jhalawar, he (respondent no.2) entered into

an oral agreement for sale of the land to him for a consideration of Rs.10 lacs, and in pursuance of the agreement gave an undated cheque for Rs.5 lacs as part payment of the price. The respondent stated that relation between them was thick and cordial. With a dishonest intention, however, the appellant wrote date ‘17.5.2000’ on the cheque and presented the same to his banker for payment. On coming to know of this fact, the respondent informed the State Bank of India, Jhalawar Branch, to stop payment. The respondent later filed suit for specific performance of contract, the appellant on his part instituted a criminal case under Section 138 of the Negotiable Instruments Act in a court at Mumbai which was got dismissed as withdrawn.

The appellant in his written statement denied to have entered into any oral agreement with the respondent or received cheque for Rs.5 lacs towards price of the land. He stated that the respondent had taken loan of Rs.5 lacs from him for doing business in real estate on condition of repayment with interest @ 18% per annum. The appellant had at the relevant time sold the land of Mohini Kunj situate in front of

Police Parade Ground at Jhalawar and he had the money. The cheque was given as security.

By the proposed amendment, the appellant sought to incorporate in para 2 of the written statement, statement to the effect that the property was worth Rs.80 lacs and in no case could be sold for Rs.10 lacs. In para 4, the appellant wanted to incorporate statements denying the plaintiff's case that he had cordial relationship with the appellant and therefore he had given undated cheque for Rs.5 lacs. The appellant in fact had given Rs.5 lacs in cash to the respondent on his giving him cheque no.418550 of SBI, Jhalawar Branch. In para 5 of the written statement, the appellant sought to incorporate statements to the effect that on 31.5.1996 the Pargana Officer had passed order for appointment of Receiver with respect to the land in question which was upheld by the Settlement Officer and the Revenue Appellate Authority, Kota on 26.11.1996, and in the circumstances, the question of appellant agreeing to sell the land to the plaintiff did not arise. The appellant also referred to certain orders in partition

suit dated 27.9.2001 and 7.2.2003. Finally in para 10, the appellant sought to add statement to the effect that the value of property being more than Rs.80 lacs, the court-fee paid by the plaintiff was insufficient and the suit was fit to be dismissed.

We shall refer to the proposed amendment regarding counter claim later.

On a plain reading of the statements which the appellant seeks to incorporate in his written statement – as summarized above – it is evident that they do not amount to a new case. Rule 17 of order VI of the Code of Civil Procedure provides that court may at any stage of the proceedings allow either party to alter or amend the his pleadings as may be necessary for the purpose of determining real questions in controversy between the parties. Thus all amendments which appear to be necessary for determining the controversy between the parties should be allowed. The appellant had already denied the plaintiff’s case of oral agreement for sale and stated that he had paid Rs.5 lacs in cash to the respondent for doing business

and that the cheque in question had been issued by him as security for repayment. The averments which the appellant now seeks to incorporate in no way change his case. It is well settled that amendment should be allowed in the pleadings if it does not change nature of the suit or take away any right of the other party. The proposed amendments in the instant case simply seek to elaborate the appellant's case, and we are inclined to think that by refusing the prayer for amendment the trial court failed to exercise jurisdiction vested in it by law.

Coming to the counter claim, the appellant reiterated his case of paying of Rs.5 lacs and delivering undated cheque to him as security. The appellant stated in this regard that the respondent had told him to present the cheque for encashment after 17.5.1995 and the money would be deposited by then in the bank. The respondent did not do any business in property dealing, and when the appellant sent the cheque for payment, it was returned with endorsement that the respondent had no money in his account. For this, the appellant instituted a criminal

case under Section 138 of the Negotiable Instruments Act in the court of Additional Chief Metropolitan Magistrate, 9th court, Bandra, Mumbai. On the intervention of some people he withdrew the case on the assurance that the respondent would sell the land near the bungalow of one Dr. Nagori and pay him the money, but the respondent failed to pay the money. The plaintiff stated that the cause of action for setting up counter claim had arisen on 13.12.2002 when he received the notice of the present suit. The respondent in his rejoinder to the amendment application took the plea, as regards counterclaim, that the appellant had filed his written statement on 21.2.2003 and therefore, in terms of rule 6-A (1) of order 8 of the Code of Civil Procedure, the counter claim could not be entertained. The respondent also took the stand that the counterclaim was barred by limitation and it could not be set up by amendment. In our opinion, both the objections are well-founded.

Under order 8 rule 6 A(1) of the Code of Civil Procedure, a defendant in suit may in addition to his right of pleading a set off under rule 6, set

up by way of counter claim any right or claim in respect of cause of action accruing to him against the plaintiff either before or after filing of suit “but before the defendant has delivered his defence or before the time limited for delivering his defence had expired”.

As regards limitation, way back in L.J. Leach & Co. Ltd V. Jardine Skinner and Co., AIR 1957 SC 357, the Supreme Court held that the Court would as a rule decline to allow amendments if a fresh suit on the amended claim would be barred by limitation on the date of application. In Laxmidas Dayabhai Kabrawala V. Nanabhai Chunilal Kabrawala, AIR 1964 SC 11, it was held that amendment can be refused when the effect of it would be to take away from a party a legal right which had accrued to him by lapse of time. It may be so when fresh allegations are added or fresh reliefs are sought by way of amendment. Reference may also be made to Punjab National Bank Vs. Indian Bank, (2003) 6 SCC 79, T.N. Alloy Foundry Co. Ltd V. T.N. Electricity Board, (2004) 3 SCC 392 and Raj Kumar V. Dipender Kaur Sethi, (2005) 9 SCC 304.

Though the appellant claimed that the cause of action had arisen on 13.12.2002 when he received notice of the suit it is plain that the cause of action accrued on handing over the cheque allegedly as a security which got dishonoured. The appellant did institute a criminal case under Section 138 of the Negotiable Instruments Act but for reasons known to him, withdrew the same. If on the date when he filed the amendment application he could not file a suit of his own for recovery of money, it would follow that he cannot seek the same relief by way of counter claim in the present suit. That part of the proposed amendment therefore, could not be allowed.

In view of the above discussions, while the proposed amendments in paragraphs 2, 4, 5 and 10 of the written statement, referred to above, are fit to be allowed, those related to the counter claim was rightly rejected. The impugned order of the Additional District Judge dated 18.8.2006 as that of the learned Single Judge dated 3.5.2006 are accordingly modified to this extent, and the writ petition and the appeal

of the appellant are thus allowed in part to that extent.

[AJAY RASTOGI], J. **[S.N. JHA], CJ.**

Skant/-